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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK FLORES,

Defendant and Appellant.

2d Crim. No. B207801  
(Super. Ct. No. 2006035236)  
(Ventura County)

Mark Flores appeals from a judgment entered following his conviction by a jury of the unauthorized taking of a vehicle. (Veh. Code, § 10851, subd. (a).) Appellant admitted allegations of one prior prison term (Pen. Code, § 667.5, subd. (b))<sup>1</sup> and two prior serious or violent felonies within the meaning of California's "Three Strikes" law. (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i).) He was sentenced to prison for 25 years to life plus one year for the prior prison term. Appellant contends that the trial court abused its discretion in refusing to dismiss one of the two "strikes." We affirm.

*Facts*

Deanna Rodriguez had a "romantic dating relationship" with appellant. Rodriguez owned a 2003 Nissan Altima. While Rodriguez was "half asleep" in her bedroom, appellant put his hands on her throat and started to choke her. Rodriguez told her son to

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<sup>1</sup> All further statutory references are to the Penal Code.

telephone 911. Appellant stopped choking Rodriguez, grabbed her car keys, and left the residence. Rodriguez yelled, "Don't take my car." But appellant entered her car and drove away. Two days later, Rodriguez recovered her car in the parking lot of a restaurant. An anonymous telephone caller had informed her of the vehicle's location.

### *Discussion*

A court's decision not to dismiss a strike is "reviewed under the deferential abuse of discretion standard . . . ." (*People v. Carmony* (2004) 33 Cal.4th 367, 371.) In exercising its discretion, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the . . . spirit [of the "Three Strikes" scheme], . . . and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161; accord, *People v. Garcia* (1999) 20 Cal.4th 490, 503.)

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at pp. 376-377.)

Based on the following five factors, the trial court did not abuse its discretion:

(1) The commission of the present crime was immediately preceded by an act of violence: appellant choked Rodriguez. For the choking incident, appellant was charged with misdemeanor battery. (§ 243, subd. (e)(1).) The jury was unable to reach a verdict

on this charge. Nevertheless, the court could consider the choking incident in view of Rodriguez's testimony and defense counsel's remarks during closing argument. Counsel told the jury: "[W]e are not contesting . . . the battery on Ms. Rodriguez. She had redness in her neck. She reported to being choked and that it was [appellant]. I'm not contesting that it was [appellant]."

(2) Appellant has an extensive juvenile offender record, including sustained petitions for battery and attempted grand theft from the person. The victim of the attempted grand theft was a nine-year-old girl who sustained a cut to her forehead while resisting appellant's efforts to take her purse. Appellant's juvenile record is replete with violations of probation. In 1998, when appellant was 16 years old, he was committed to the California Youth Authority (CYA). He violated CYA parole.

(3) Appellant also has an extensive adult criminal record with numerous violations of probation. In 2000 appellant pleaded no contest to vandalism and injuring a vehicle. According to the probation report, appellant "and several others smashed the window of the victim's vehicle as they yelled gang-related obscenities." In 2002 he pleaded guilty to possession of a controlled substance. In 2003 he pleaded guilty or no contest to possession of methamphetamine and to resisting a peace officer on two separate occasions. In 2004 he pleaded guilty or no contest to several misdemeanor offenses, including resisting a peace officer on two separate occasions. In 2005 appellant pleaded guilty to the two strikes: attempted kidnapping (§§ 664, 207, subd. (a)) and making criminal threats. (§ 422.) Appellant was sentenced to prison. He committed the present crime while on parole.

(4) The probation report states that appellant denied being an active gang member, but he admitted that he had associated with a criminal street gang through 2004. The letters SOX were tattooed on his head. These letters stand for the South Oxnard gang. Appellant had another tattoo with the letters SSCH, which stand for the Southside Chiques gang.

(5) The probation officer reported that, during his incarceration for the present crime, appellant had been disciplined for 26 " 'major' violations," including "failing to

obey a directive/disrespect (11 times); contraband (six times); destruction of county property (five times); misuse of the emergency button/intentionally flooding cell (two times); battery towards an inmate (inmate was hit five-six times[]); and instigating a fight between two inmates."

In view of the above factors, the trial court reasonably concluded that appellant did not fall outside the "spirit" of the "Three Strikes" law. (See *People v. Williams*, *supra*, 17 Cal.4th at p. 161.) We cannot say that the trial court's refusal to dismiss one of the strikes was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377.)

Appellant contends that we "should find an abuse of discretion because the [trial] court's decision was reached without consideration of appellant's serious mental illness." In November 2007 appellant was diagnosed as suffering from "Schizophrenia, Paranoid Type" and "Antisocial Personality Disorder." The diagnosis was made after appellant had been found mentally incompetent to stand trial and had been committed to Patton State Hospital pursuant to section 1370. The diagnosis appears in a report in which hospital staff opined that appellant "can be returned to court as competent to stand trial pursuant to [section] 1372."

Appellant assumes that the trial court did not consider his mental illness because it stated: "[E]xcept for the nature of the current offense, there is no other apparent reason why the Court should exercise its discretion in [appellant's] favor on this motion. But this statement fails to show that the court did not consider appellant's mental illness. The court impliedly determined that his mental illness was not a legitimate reason for dismissing one of the strikes, and appellant has failed to demonstrate that this determination was unreasonable. "The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary. [Citation.]" (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Even if the record had affirmatively shown that the trial court did not consider his mental illness, appellant would be precluded from urging this omission as a ground for reversal. The issue is waived because appellant neither asked the court to consider his

mental illness nor presented any evidence on the issue. (See *People v. Lee* (2008) 161 Cal.App.4th 124, 130-131)

Appellant argues that the trial court abused its discretion because the two strikes - attempted kidnapping and making criminal threats - "were based upon essentially the same act." In *People v. Benson* (1998) 18 Cal.4th 24, 36, fn. 8, our Supreme Court left open the question "whether there are some circumstances in which two prior felony convictions are so closely connected - for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct - that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors."

According to the probation report, the facts underlying the two strikes are as follows: Appellant entered a vehicle, sat behind the driver, and "placed his hand over the waistband of his pants, implying that he had a weapon." Appellant "told the [driver] that he was going to drive [appellant] 'somewhere.' At that point, [the driver's girlfriend] exited the vehicle and called police." Appellant "demanded a ride, but told the [driver], 'Don't move, or I'll kill you.' . . . As the [driver] attempted to stall as he waited for police, [appellant] told him, 'Hurry up, either way you're dead.' "

The two strikes did not arise out of appellant's single act. Instead, they arose "from multiple acts committed in an indivisible course of conduct." (*People v. Benson, supra*, 18 Cal.4th at p. 36, fn. 8.) When the driver's girlfriend exited the vehicle to call the police, the elements of attempted kidnapping had already been satisfied. The criminal threats were independent acts that occurred after the girlfriend's exit.

Finally, appellant contends that the trial court abused its discretion because he had decided not to testify based on the court's off-the-record warning "that any perceived attempt to testify falsely would be considered at the time of sentencing." This contention is based on facts set forth in defense counsel's declaration. Appellant maintains that the court's "admonishment reasonably implied that [it] was inclined to exercise discretion in favor of imposing less than the mandatory term of at least 25 years to life and appellant

should carefully consider whether to jeopardize that inclination by testifying in any manner which might be perceived as untruthful."

The trial court's alleged admonition is irrelevant to this appeal. The court never suggested that it would dismiss one of the strikes if appellant did not testify.

*Disposition*

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Steven E. Hintz, Judge  
Superior Court County of Ventura

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